IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 791

RONALD L. CRANE, *Petitioner*,

v.

CEDAR RAPIDS AND IOWA CITY RAILWAY CO., *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Iowa

REPLY BRIEF FOR PETITIONER

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MISCELLANEOUS:

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REPLY BRIEF FOR PETITIONER

THE FACTS

Respondent's factual case is built on the following assumptions:

(a) The attempted recoupling of the cars took place on a curve, and in order to accomplish this, the knuckle that opens toward the outside curve must be open and the one toward the inside curve must be closed. There was no evidence that the knuckles were in this position.

(b) Cars are not likely to couple at less than two miles per hour, and these cars at time of impact were moving at one-half mile per hour, according to a test conducted by respondent.

As we show in capsule form below, each of these assumptions is contradicted by the record. But there is an even more direct answer to them. *Respondent made precisely the same factual arguments to the trial court—once in a motion for a directed verdict at the conclusion of petitioner's evidence (A. 86-91) and a second time in a motion to dismiss Count II at the conclusion of all the evidence (A. 121-123). In both instances, the arguments were rejected (A. 91-123) and the case was allowed to go to the jury.* Respondent nevertheless continues to make them in this Court.

Out of an excess of caution, we will briefly answer each contention:

(a) The jury could have found that the cars were *not* on a curve at the time they were recoupled. The testimony cited by respondent related to the place where Crane climbed on the third car *before* the string was moved (A. 26-27, 31-32). Following that, the winch and cable moved the string, cars one and two were uncoupled, and the brakes were applied to the remaining string (*ibid.*). Crane was unable to say exactly where the string was at the time of impact (A. 32), and the jury may well have concluded it was on the straight portion of the track. As shown by the exhibits—and particularly Pl. Ex. 2—the curve was not sharp and was very limited in length.

Even if the attempt to recouple took place on a curve, the evidence showed that the cars should have coupled,

for respondent's own expert witness admitted that if the knuckle had opened sufficiently to release the car—which it had (A. 26, 29, 32, 67-68)—and if the third car remained on the curve where it had been left—which it did (A. 26, 27, 32-33, 67-68)—the cars should have recoupled.[1]

Finally, all that is required under the law is that one of the two couplers be open and that the cars be brought together with sufficient impact to effect a coupling.[2] The fact that the coupling took place on a curve, and the claimed misalignment is supposedly due to the curve, is no defense.

(b) As to respondent's contention about the speed of the cars, suffice it to say that its "test" was carried out almost four years after the accident (A. 23, 112); there was no evidence that the winch speed was the same as at the time of the accident (Tr. 640); the speed of cars varied in the saucer-like area between the scale and the meal house due not only to the terrain but

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[1] He testified: "Assuming the knuckle opened sufficiently to release the car and assuming that the car remained in the exact same position and on the same curve and that no change was made, and that the cars were brought back together, the other knuckle would fit in just exactly the same way it came out" (A. 105). In addition, this question and answer were given: "Q. No, I put the additional fact in that it was uncoupled on a track that was curved as we see it here, Plaintiff's Exhibit 2, and brought back together, understand under the same set of facts with the third car not having been moved at all and the contact made with the same situation as when they left each other, and at that point the knuckles completely closed. Now, I am asking you under those circumstances, isn't it true that the coupling should have made and stayed and locked? A. Well, my answer would be yes, that it should have" (A. 107-108).

[2] *Affolder* v. *New York, Chicago & St. Louis R.R. Co.*, 339 U.S. 96 (1950).

to such factors as weather, ball bearings, car weight, whether the cars were loaded, etc. (A. 79, 117); the two cars brought from the scale were going sufficiently fast so that they pushed the string of four other cars back "about five feet" (A. 33)—a fact conceded by respondent (Brief p. 2); and, finally, when the cars broke away, they were "moving too fast to my estimation" (A. 25), they "took off quite rapidly" (A. 28).

Obviously, the trial court correctly held that all of these matters were for the jury.[3]

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[3] Respondent's description of its lack of responsibility and control in relation to the cars and tracks in question (pp. 38-43 of its Brief), although completely irrelevant to the issues in the case, should be compared with the following testimony by Cargill's supervisor:

> • • • Crandic Railroad [an abbreviation of respondent's full name] engines and crews are switching in that area all the time, and have seen our movement of the cars by means of the winch. I have never seen any railroad other than the Crandic bring in cars on the meal house track. Also, Crandic Railroad takes the cars out after loading on the meal house track, beyond the elevator, where the meal house track ties into other tracks of the Crandic Railroad.
>
> • • • • •
>
> We sometimes cover up a hole in the boxcar if it won't hold meal, but if something is wrong with the equipment, such as brakes, couplers, that is taken care of by a certain person from the Crandic Railroad. Cargill does not own any switch engines. To my knowledge no Cargill employees work on the tracks, as far as repairs are concerned. • • •
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> • • • • •
>
> • • • I can identify who took care of the repairs by the truck that came down. It has a Crandic sign on the truck. • • •
>
> • • • • •
>
> • • • No one connected with Cargill is assigned to inspect the equipment on cars such as brakes, couplers, and other equipment. [A. 80-83.]

Respondent unfortunately misleads the Court at the end of its Statement of the Case by quoting, without qualification or explanation, an instruction requested by petitioner which sounds, by itself, as if petitioner was himself injecting the issue of contributory negligence into the case. What respondent neglected to tell the Court was that at the hearing on submission of requested instructions, petitioner's attorney told the court:

> Your Honor, for the record the plaintiff would like to state its emergency requested instruction is submitted only because of the Court's prior ruling that contributory negligence is involved in the case. That as to Count II it has been and is plaintiff's position throughout this trial that it is absolute liability if the violation is shown. [A. 92.]

In other words, the instruction in question was submitted solely because petitioner's position on contributory negligence had been rejected. The instruction in no way waived or diluted petitioner's primary position, maintained throughout the case, that liability was absolute.

THE LAW

Respondent's argument on the law rests on this statement: "Absolute liability does not result unless some statute sets up a special cause of action for its breach" (Brief p. 27). Repeatedly in its brief respondent makes the same point and, in arguing that the Safety Appliance Act did not create its own cause of action, therefore concludes that contributory negligence cannot have been abolished as a defense (Brief pp. 5, 9, 15, 18, 20, 21, 24, 27, 29, 30, 32, 45).

For purposes of argument, we will assume that the Act does not create its own federal cause of action, although the law on the point is far from clear.[4] That does not, however, end the matter by any means. As Professors Louisell and Anderson point out, even though the Act "does not create a federal cause of action," it does "superimpose on state-created causes certain federal requirements"; one of these is that "violation of the Act creates absolute liability without regard to negligence," and the Court should make clear that "contributory negligence is no longer a defense."[5]

This view is completely consonant with prior case law holding that rights rooted in federal law cannot be defeated by local common law rules. Thus, in *Central Vt. Ry. Co.* v. *White*, 238 U.S. 507 (1915), which respondent fails to mention, the Court held that which party has the burden of proving contributory negligence or the lack thereof in an FELA case in a state court is a question of federal, not state, law, and the federal rule is that the defendant carries the burden.

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[4] See *e.g.*, *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33 (1916); *Ross* v. *Schooley*, 257 Fed. 290 (7th Cir.), *cert. denied*, 249 U.S. 615 (1919). The Court in *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, 338 U.S. 384, 390 (1949), ruled that "* * * a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong * * *." The real test would come if a State denied all recovery under the Act on the theory that it had no cause of action of its own suitable to enforcement of the liability imposed by the Act. We believe the Court would hold that the cause of action is inherent in the Act itself. *Cf. Mondou* v. *New York, New Haven & Hartford R. R.*, 223 U.S. 1 (1912).

[5] "The Safety Appliance Act and the FELA: A Plea for Clarification," 18 Law & Contemp. Prob. 281, 295 (1953). Similarly, Dean Prosser, the Reporter for the Restatement of Torts (Second), has stated that the Safety Appliance Act falls within that class of safety legislation "for whose violation there is no recognized excuse." Prosser, *Law of Torts*, 198-99 (3rd Ed. 1964).

And in *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952), which respondent also does not mention, the Court held that in an FELA case in a state court, the questions whether a fraudulently obtained release could be used to defeat the claim and whether the issue of fraud could be decided by the trial court had to be resolved by federal, not state, standards. The Court used this significant language:

> * * * Manifestly the federal rights affording relief to injured railroad employees *under a federally declared standard* could be defeated if states were permitted to have the final say as to *what defenses could and could not be properly interposed* to suits under the Act. Moreover, only if federal law controls can the federal Act be given that *uniform application throughout the country essential to effectuate its purposes.* [*Id.* at 361; emphasis added.[6]]

> * * * It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere *"local rule of procedure"* for denial in the manner that Ohio has here used. [*Id.* at 363; emphasis added.]

That is precisely what we claim here. Regardless of whether the cause of action is labeled federal or state, the Safety Appliance Act clearly establishes an absolute duty and eliminates assumption of risk and the fellow-servant doctrine from every case arising out of

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[6] See also *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942): "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. * * * To the federal statute *and policy* conflicting state law and policy must yield" (emphasis added).

its violation. Obviously, the defense of contributory negligence rates on a par with these matters and must be decided by federal and not state standards, for otherwise, as the Court said in *Dice* in regard to FELA, "uniform application throughout the contrary essential to effectuate [the Act's] purposes" will be frustrated. To contend that the defense is merely a local rule of procedure—on a par, for example, with the order of witnesses—is to ignore the results in cases like this one, where the defense defeated recovery.

Finally, if there were any doubt on the matter, it is completely laid to rest by still another case which respondent does not mention, although petitioner devoted two pages of its brief to a discussion of it (pp. 19-20). The case, *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U.S. 281 (1908), involved only the Safety Appliance Act and not FELA. The railroad, making the same type of argument advanced by respondent here, asserted that the Act said nothing about absolute liability or the fellow-servant doctrine, and that therefore the railroad could use the negligence of a fellow servant as a defense in a state court suit. This Court, pointing not to precise statutory language but to the overall intent of Congress, rejected the argument and read the fellow-servant doctrine out of the Act—not only for employees of the defendant railroad but for everyone covered by the Act.[7] The same congressional

[7] The same type of reasoning led the Court in *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, 338 U.S. 384 (1949), to read into the Act the requirement that couplers remain coupled until some purposeful act of control sets them free—a requirement nowhere specifically spelled out in the Act itself.

intent which dictated the result in that case is applicable here.[8]

Respondent relies on six of this Court's decisions (Brief pp. 11-24), *all* of which were decided in the period 1911-1935. None of respondent's cases, in other words, is less than thirty-four years old. We have already shown in our main brief (pp. 27-29) the misreliance placed by these cases on the second *Schlemmer* decision.[9] And all of the cases, as Professors Louisell and Anderson have pointed out, "still reverted on occasion to negligence terminology when considering violations of the Act" (*supra* n. 5 at 294). The lesson from the cases over the entire span of the Act, on the other hand, is that "construction of the Safety Appliance Act has been an evolutionary process not unlike the growth of the interstate commerce concept" (*id.* at 295), so that a simple reference to dated decisions works only to show how far interpretation of the Act has come.

Respondent would have the Court believe that references in its opinions since 1935 to the "absolute and unqualified prohibition" in the Act and "absolute liability" under the Act have been inadvertent and erro-

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[8] In a case under the analogous Boiler Inspection Act and FELA, *Urie* v. *Thompson*, 337 U.S. 163 (1949), the Court ruled that silicosis is an "injury" under both Acts not by reference to specific language in either Act but rather because of the breadth of the statutory language, the Acts' humanitarian purposes, their liberal construction in the past, the absence of any legislative history *excluding* the disease, and the *trend* of existing authorities—all of which criteria are applicable here. Particularly pertinent was the Court's remark that "The safety of all those affected by railroading was uppermost in the legislative mind" (*id.* at 191).

[9] *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 220 U.S. 590 (1911). All of the decisions relied on by respondent cited *Schlemmer* except *Gilvary* v. *Cuyohoga Valley Ry.*, 292 U.S. 57 (1934), which did not mention contributory negligence at all.

neous. We submit that the Court knew precisely what it was doing. By way of example, in *Shields* v. *Atlantic Coast Line R.R. Co.*, 350 U.S. 318, 325 (1956), the Court stated without qualification that as to the employee of an independent contractor, "the violation of the statute [Safety Appliance Act] must therefore result in absolute liability," even though FELA was not involved. That this was no inadvertent use of terms is demonstrated by the fact that contributory negligence was specifically pleaded in Paragraph VIII of the railroad's Answer in that case (O.T. 1955 No. 150, R. 58); the defendant objected "to that part of his Honor's oral charge wherein he instructed the jury that any negligence on the part of the plaintiff would not be applicable under the Federal Safety Appliance Act" (*id.* at R. 285); the same point was made part of the defendant's Statement of Points on appeal to the Fifth Circuit (*id.* at 312); the Fifth Circuit in its opinion stated that the plaintiff "invokes both the absolute liability imposed by the Safety Appliance Acts * * * and the qualified liability arising out of negligence" (220 F.2d 242, 243), and this Court (on affirming judgment for plaintiff) noted that the plaintiff alleged in his first count "absolute liability for a violation of the Act" (350 U.S. at 319).

We submit that in its more recent decisions the Court has meant exactly what it said: that the common law defense of contributory negligence is no longer to be deemed available to frustrate the congressional will that liability is absolute once the requisites of the statute have been met.[10]

[10] Respondent equates the type of liability sought here with the absolute liability of state workmen's compensation statutes. The two are not the same. For workmen's compensation, the employee need only show his injury on the job. For th recovery sought

Respondent says that "The petitioner can point to no statute, either Federal or State, which would permit non-railroad employees to be placed in the same category as railroad employees" (Brief p. 43). Precisely the opposite is true. Railroad and non-railroad employees alike are owed an absolute duty under the Safety Appliance Act; assumption of risk is not a defense as to either; and the fellow-servant doctrine cannot be applied to either. All Crane seeks is to enforce the same treatment as to contributory negligence that has already been afforded other litigants covered by the Act.[11]

Respondent, by its reliance on *Edwards* v. *Pacific Fruit Co.*, 390 U.S. 538 (1968) (Brief pp. 44-45) and

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here, the plaintiff must meet several statutory requirements, including proof that the equipment did not work and that the defective equipment was a proximate cause of his injury. The distinction between the two types of recovery is pointed up by *Myers* v. *Reading Co.*, 331 U.S. 477, 482, 485 (1947), where the Court said: "There was an absolute and unqualified prohibition against the respondent's using or permitting to be used, on its line, any car not equipped with 'efficient hand brakes.' * * * The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law. As an interstate common carrier, however, it is subject to liability for injuries to its employees resulting from its violation of its absolute duty to comply with the Safety Appliance Acts."

[11] Respondent poses as a threat the fact that "If the petitioner's construction of the Federal Safety Appliance Act were adopted, all that would be essential for a plaintiff to prove, in order to establish absolute liability on the railroad, would be that, if the brakes on the train had been functioning in the normal, natural, and usual manner at the time of the collision, no accident would ever have occurred" (Brief, p. 47). But that is precisely the situation today if the suit is brought under FELA. Thus, Crane is not seeking a hitherto unknown expansion of the railroad's duty, but rather equal treatment for non-railroad employees.

its discussion at pp. 40-43 of its Brief, implies that Crane's recovery should be limited to workmen's compensation. Yet even respondent has agreed throughout the case that Crane is covered by, and can sue under, the Safety Appliance Act (see Respondent's Brief p. 5). Absent the alleged contributory negligence, Crane clearly would have recovered money damages from respondent. Therefore, the entire discussion about workmen's compensation is irrelevant to the case. The issue is not whom Crane can sue or the nature of his recovery but which defenses can be asserted against him.

The gross absurdity of the result sought by respondent is illustrated by the "contributory negligence" of which it says Crane was guilty (Respondent's Brief p. 37). It says that either Crane should have looked to see that the pin on the coupler had dropped, or, if he could not see the pin, he should have taken up the stretch on the cars (*ibid.*).

In the first place, Crane and Harris both looked at the coupling, and the knuckles appeared locked, which in turn should have caused the pin to drop (A. 27, 35, 38, 39, 40, 44, 47, 55, 74, 75, 76-77). Crane could not actually see the pin (A. 35, 39), and it was not his job to stretch the cars (A. 23, 67-68). Therefore, what respondent ends up claiming is that some other employee failed to stretch the cars. Yet the fellow-servant defense has been eliminated under the Act. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor, supra.*

But even more to the point, the Act does not say anything about looking at pins or stretching cars. The Act says that upon impact the couplers must automatically couple. These cars impacted to the extent

that the string was moved, as respondent itself concedes (Brief p. 2), about five feet. Therefore, it is not Crane who is attempting to graft language onto the Safety Appliance Act, but rather respondent, which wants to require specific steps by workmen on railroad cars over and beyond the simple requirements set forth by Congress in the Act.

As for respondent's claim of "manifest injustice" in making the railroad instead of Crane's employer responsible for damages because the cost of his injury should not be "an expense of railroading" but rather a workmen's compensation expense (Brief pp. 41-42), suffice it to say that it was not Cargill that delivered the car with a defective coupler. What possible injustice could there be in making the supplier of the defective equipment responsible for injuries caused by the equipment's defects?

Respondent laments that it cannot "pass the burden back to Cargill or to its workmen's compensation carrier" (Brief p. 43), but why should it be allowed to pass the burden if it supplied a defective coupler? Respondent says that "This is not a case where the petitioner was a railroad worker who was daily exposed to the risks inherent in railroad work, who was helpless to provide adequately for his own safety" (Brief p. 42). But Crane *was* a worker on railroad equipment who *was* daily exposed to the risks inherent in railroad work and who *was* helpless to provide for his own safety—as much so as if he had been employed by respondent. That was his job: to spot, weigh and load railroad cars on respondent's line. *Cf. Sinkler* v. *Missouri Pacific R. R.*, 356 U.S. 326 (1958). Saddling Crane's employer with the cost of injuries emanating from a defective coupler sup-

plied by respondent would itself be "manifest injustice" and contrary to the intent of Congress. The real intent behind the Acts, after all, was to force the railroads to eliminate defects and make sure the equipment works. You do not accomplish this by shifting the burden from the railroad to someone else. And as pointed out by the amicus union, you do not accomplish it by encouraging the railroad to *put off* repairs until after cars have passed through the hands of third parties and are back on the railroad's main lines.

The congressional intent was stated in the preamble to the Act: "An act to promote the *safety* of *employees* and *travelers* upon railroads by *compelling* common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes" (27 Stat. 531 (1893)). Adopting respondent's position would subvert that purpose.

Petitioner can end this brief in no better way than to quote the conclusion of Professors Louisell and Anderson in their fair and persuasive article on the subject now before the Court:

> The Safety Appliance Act does not create a federal cause of action, but it does superimpose on state-created causes certain federal requirements, and thus makes federal questions of issues often determinative of the outcome of litigation which invokes the Act. One federal requirement is that violation of the Act creates absolute liability without regard to negligence. This the Supreme Court has made clear. Another federal requirement is that not only railroad employees but other employees and travelers at railroad crossings are within the Act's scope of intended protection. But often the courts avoid this federal requirement to the prejudice of the consignor's and consignee's

employees who load and unload railroad cars by formalistic construction of the Act which exalts finical analysis of such terms as "using," "on its line," etc., over realistic appraisal of the purpose of the Act. The Court in the first appropriate case presented should exercise its jurisdiction to make clear that application of the Act's absolute standards cannot be evaded by such formalistic construction. When the plaintiff is a railroad employee the courts do not indulge in such formalistic construction to the sacrifice of the Act's purpose; neither should they when the plaintiff is not a railroad employee. The Act's purpose is to protect alike all who are subject to the risks of its violations. Lastly, the Court should make clear whether contributory negligence is or is not a valid defense to an action for violation of the Act. We submit that the logical implication of the *O'Donnell, Carter,* and *Affolder* opinions is that contributory negligence is no longer a defense. [*Supra* n. 5 at 295.]

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